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Ku Ek Mei v Pemungut Duti Setem, UTC Johor Bahru

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(NCvC)(A)-653–11 OF 2019
LAU BEE LAN, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA
22 JULY 2021

C *Revenue Law — Stamp duty — Assessment — Appeal against decision of collector of stamp duty — Judicial commissioner ('JC') dismissed appeal — Whether there was failure to apply correct principle of law as to what constituted comparable method of valuation — Whether JC erred when failed to order respondent to refund excess payment made by appellant on stamp duty* D *— Stamp Act 1949 s 39*

This was an appeal from the appellant against the decision of the learned judicial commissioner ('JC') in dismissing the appellant's appeal pursuant to s 39(1) of the Stamp Act 1949 ('the Act') by way of case stated by the collector E of stamp duty. By a sale and purchase agreement, the appellant agreed to purchase HSM 1501, PTD 116764 ('the first subject lot') and HSM 1614, PTD 136949 ('the second subject lot') from Luxury Setup Sdn Bhd for the consideration of RM1m and RM5m respectively. The appellant then submitted to the deputy collector of stamp duty for adjudication under s 36 of F the Act, the land transfer forms in Forms 14A under the National Land Code at the consideration sums of RM1m for the first subject lot and RM5m for the second subject lot. The Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') assessed the market value of the two properties. Following the said valuations, the deputy collector of stamp duty assessed the duty payable of the first subject G lot as RM70,920 based on the market value of RM2,564,000; and the second subject lot as RM432,000 based on the market value of RM14,600,000. The appellant objected to the assessment and contended that the assessment in respect of the first subject lot should be RM27,000 based on the market value of RM1m; and the assessment in respect of the second subject lot should be H RM196,050 based on the market value of RM6,735,000. The appellant's objections were rejected by the deputy collector of stamp duty. The appellant paid the stamp duties and filed the appeal in the High Court against the decision of the deputy collector of stamp duty. JPPH produced a valuation report valuing both properties at a reduced value of RM2,089,000 for the first I subject lot and RM13,970,000 for the second subject lot and the deputy collector of stamp duty issued to the appellant an amended assessment for stamp duty payable as the first subject lot — RM56,670 based on the market value of RM2,089,000 and reducing the stamp duty payable by RM14,250; and the second subject lot — RM413,100 based on the market value of

RM13,970,000 and reducing the stamp duty payable by RM18,900. The learned JC held that the crux of the appeal revolved around which assessment was preferred, namely: (a) the respondent's assessment of stamp duty amounting to RM56,670 and RM413,100 or (b) the appellant's assessment of stamp duty of RM1.1m for the first subject lot and of RM6,735,000 for the second subject lot. Having preferred the respondent's valuation report to that of the appellant's valuation report, the learned JC found that the stamp duty assessed by the respondent was correct and consequently dismissed the appellant's appeal. Hence, this appeal by the appellant.

Held, allowing the appeal with costs:

(1) In arriving at 'the fair value per square metre' in determining the market value of the first subject lot, the learned JC did not specify 'the necessary upward and downward adjustments' made to 'the differing factors.' Although it was the sales evidence of the actual price that must be used as the comparable, the prices paid for such sales were qualified by the common rider 'subject to making allowances for all the circumstances'. Evidence of sales involving similar lands was not the sole criterion. The consideration of the price paid in respect of the comparable used was not the sole determinant to determine the market value of the first and second subject lots. Therefore, despite referring to *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 and agreeing that JPPH had used the comparable method of valuation, the learned JC erred in holding that JPPH had used due care and diligence in arriving at the market value of the first subject lot when Her Ladyship failed to apply the principle established in the aforesaid Federal Court authority of 'the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions' which was binding on her by the doctrine of stare decisis. In the circumstances, in respect of the first subject lot, since the learned JC was plainly wrong in her findings and the application of the law, it was ordered that the stamp duty be assessed based on the market value of RM1.1m (see paras 31, 37–39, 43 & 46).

(2) In arriving at 'the fair value per square metre' in determining the market value of the second subject lot, the learned JC did not specify 'the differing factors' to which 'the necessary upward and downward adjustments' were made. The market value of the second subject lot ought to be RM8,301,252.86. In the circumstances, in respect of the second subject lot, since the learned JC was plainly wrong in her findings and the application of the law, it was ordered that the stamp duty be assessed based on the market value of RM8,301,252.86 (see paras 49 & 55–56).

(3) It was mandatory for any excess payment of stamp duty which had been paid shall be refunded as has been explicitly provided under s 39(4) of the

Act. Since there had been an erroneous assessment of the stamp duty payable by the appellant based on the market value of the first and second subject lots, the refund of excess stamp duty shall be made by the respondent after the necessary adjustments were being made to the computation based on the assessment of the market value of the two properties (see paras 58–59).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') dalam menolak rayuan perayu menurut s 39(1) Akta Setem 1949 ('Akta') melalui kes yang dinyatakan oleh pemungut duti setem. Melalui satu perjanjian jual beli, perayu bersetuju untuk membeli HSM 1501, PTD 116764 ('lot subjek pertama') dan HSM 1614, PTD 136949 ('lot subjek kedua') daripada Luxury Setup Sdn Bhd masing-masing dengan balasan RM1 juta dan RM5 juta. Perayu kemudian menyerahkan kepada timbalan pemungut duti setem untuk adjudikasi di bawah s 36 Akta, borang pindah milik tanah dalam Borang 14A di bawah Kanun Tanah Negara dengan nilai balasan RM1 juta untuk lot subjek pertama dan RM5 juta untuk lot subjek kedua. Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') menilai nilai pasaran kedua-dua hartanah tersebut. Berikutan penilaian tersebut, timbalan pemungut duti setem menilai duti yang perlu dibayar bagi lot subjek pertama sebanyak RM70,920 berdasarkan nilai pasaran RM2,564,000; dan lot subjek kedua sebanyak RM432,000 berdasarkan nilai pasaran RM14,600,000. Perayu membantah penilaian itu dan berhujah bahawa penilaian bagi lot subjek pertama seharusnya RM27,000 berdasarkan nilai pasaran RM1 juta; dan penilaian bagi lot subjek kedua seharusnya RM196,050 berdasarkan nilai pasaran RM6,735,000. Bantahan perayu telah ditolak oleh timbalan pemungut duti setem. Perayu membayar duti setem dan memfailkan rayuan di Mahkamah Tinggi terhadap keputusan timbalan pemungut duti setem. JPPH menghasilkan laporan penilaian yang menilai kedua-dua hartanah pada nilai pengurangan sebanyak RM2,089,000 untuk lot subjek pertama dan RM13,970,000 untuk lot subjek kedua dan timbalan pemungut duti setem mengeluarkan kepada perayu taksiran pindaan untuk duti setem yang perlu dibayar terhadap lot subjek pertama — RM56,670 berdasarkan nilai pasaran RM2,089,000 dan mengurangkan duti setem yang perlu dibayar sebanyak RM14,250; dan lot subjek kedua — RM413,100 berdasarkan nilai pasaran RM13,970,000 dan mengurangkan duti setem yang perlu dibayar sebanyak RM18,900. PK yang bijaksana memutuskan bahawa intipati rayuan itu berkisar tentang taksiran yang diutamakan, iaitu: (a) taksiran duti setem responden berjumlah RM56,670 dan RM413,100 atau (b) taksiran duti setem oleh perayu sebanyak RM1.1 juta untuk lot subjek pertama dan RM6,735,000 untuk lot subjek kedua. Setelah memilih laporan penilaian responden daripada laporan penilaian perayu, PK yang bijaksana mendapati bahawa duti setem yang dinilai oleh responden adalah betul dan seterusnya menolak rayuan perayu. Oleh itu, rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam mencapai 'the fair value per square metre' dalam menentukan nilai pasaran lot subjek pertama, PK yang bijaksana tidak menyatakan 'the necessary upward and downward adjustments' yang dibuat kepada 'the differing factors'. Walaupun adalah bukti jualan harga sebenar yang mesti digunakan sebagai perbandingan, harga yang dibayar untuk jualan tersebut layak oleh penunggang biasa 'subject to making allowances for all the circumstances'. Bukti penjualan yang melibatkan tanah yang sama bukanlah satu-satunya kriteria. Balasan harga yang dibayar berkenaan dengan perbandingan bukanlah penentu tunggal untuk menentukan nilai pasaran lot subjek pertama dan kedua. Oleh itu, walaupun merujuk kepada *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 dan bersetuju bahawa JPPH telah menggunakan kaedah penilaian perbandingan, PK yang bijaksana telah terkhilaf apabila memutuskan bahawa JPPH telah melaksanakan kewajipan berhati-hati dan ketekunan wajar dalam mencapai nilai pasaran lot subjek pertama apabila Yang Arif gagal menggunakan prinsip yang ditetapkan dalam autoriti Mahkamah Persekutuan yang disebut di atas tentang 'the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions' yang mengikatnya oleh doktrin stare decisis. Dalam keadaan tersebut, berkenaan dengan lot subjek pertama, memandangkan PK yang bijaksana jelas salah dalam penemuannya dan penggunaan undang-undang, adalah diperintahkan supaya duti setem dinilai berdasarkan nilai pasaran RM1.1 juta (lihat perenggan 31, 37–39, 43 & 46).

(2) Dalam mencapai 'the fair value per square metre' dalam menentukan nilai pasaran lot subjek kedua, PK yang bijaksana tidak menyatakan 'the differing factors' yang 'the necessary upward and downward adjustments' dibuat. Nilai pasaran lot subjek kedua sepatutnya RM8,301,252.86. Dalam keadaan tersebut, berkenaan dengan lot subjek kedua, memandangkan PK yang bijkasana jelas salah dalam penemuannya dan pemakaian undang-undang, adalah diperintahkan supaya duti setem dinilai berdasarkan nilai pasaran RM8,301,252.86 (lihat perenggan 49 & 55–56).

(3) Adalah mandatori bagi apa-apa bayaran lebihan duti setem yang telah dibayar hendaklah dikembalikan sebagaimana yang telah diperuntukkan secara jelas di bawah s 39(4) Akta. Memandangkan terdapat kesilapan penilaian terhadap duti setem yang perlu dibayar oleh perayu berdasarkan nilai pasaran lot subjek pertama dan kedua, pembayaran balik lebihan duti setem hendaklah dibuat oleh responden selepas pelarasan yang perlu dibuat kepada pengiraan berdasarkan penilaian nilai pasaran kedua-dua hartanah (lihat perenggan 58–59).]

Cases referred to

Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 5 MLJ 58; [2020] 1 LNS 494, FC (refd)
Collector of Stamp Duties v Ng Fah In & Ors [1981] 1 MLJ 288, FC (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association [2011] 2 MLJ 442; [2012] 9 CLJ 977, FC (refd)
Malakoff Bhd v Pemungut Hasil Tanah Seberang Perai Utara, Butterworth [2005] 2 MLJ 229; [2005] 1 CLJ 365, FC (refd)
Nanyang Manufacturing Co v The Collector of Land Revenue, Johore [1954] 1 MLJ 69 (refd)
Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35, FC (refd)
Setia Usaha Tetap Kementerian Pelajaran v Collector of Land Revenue, Butterworth [1972] 2 MLJ 155 (refd)

Legislation referred to

National Land Code Form 14A
Stamp Act 1949 ss 12A, 39, 39(1), (4), First Schedule, item 32(a)

Appeal from: Originating Summons No JA-24NCVC-723–12 of 2017 (High Court, Johor)

YK Chin (CH Ng with him) (YK Chin) for the appellant.
Muazmir bin Mohd Yusof (Nordiana bt Sham with him) (Inland Revenue Board) for the respondent.

Lau Bee Lan JCA:

INTRODUCTION

[1] This is an appeal from the appellant (plaintiff in the court below) against the decision of the learned judicial commissioner ('JC') made on 31 October 2019 in dismissing the appellant's appeal pursuant to s 39(1) of the Stamp Act (Act 378) by way of case stated by the collector of stamp duty.

[2] The appellant is the duty payer who is aggrieved by the decision of the collector of stamp duty, UTC Johor Bahru, in respect of the stamp duties payable on the sale and transfer of two properties held under HSM 1501, PTD 116764, Mukim Pulai, Daerah Johor Bahru, Negeri Johor, and HSM 1614, PTD 136949, Mukim Pulai, Daerah Johor Bahru, Negeri Johor to the appellant under item 32(a), Act 378. The respondent (defendant in the court below) is the collector of stamp duty.

[3] The appellant's appeal is in respect of an originating summons dated 24 December 2017 filed in the High Court for the following reliefs:

(3) bahawa Defendan telah terkhilaf dalam mengambilkira nilai RM2,564,000.00 sebagai nilai pasaran hartanah pertama tersebut;

(4) bahawa Defendan telah terkhilaf dalam mengambilkira nilai RM14,600,000.00 sebagai nilai pasaran hartanah kedua tersebut;

(5) bahawa Defendan khilaf dalam menaksirkan duti setem yang dikenakan ke atas Perjanjian Jual Beli tersebut dan/atau Borang Pindahmilik pertama tersebut untuk pindahmilik hartanah pertama tersebut sebagai terjumlah RM70,920.00;

(6) bahawa Defendan khilaf dalam menaksirkan duti setem yang dikenakan ke atas Perjanjian Jual Beli tersebut dan/atau Borang Pindahmilik kedua tersebut untuk pindahmilik hartanah kedua tersebut sebagai terjumlah kepada RM432,000.00;

(7) bahawa Defendan khilaf dalam keputusan menolak notis bantahan Plaintif seperti dalam surat peguamara Plaintif bertarikh 3/11/2017 dan mengekalkan taksiran duti setem hartanah kedua berjumlah RM432,000.00 atas kajian semula menurut Seksyen 39A(4) Akta Setem 1948;

(8) bahawa taksiran duti setem tersebut yang dibuat oleh Defendan diubah dan bahawa Mahkamah Mulia ini mengarahkan supaya duti setem yang dikenakan ke atas Perjanjian Jual Beli tersebut ditaksir berjumlah RM27,000.00 berdasarkan Laporan Penilaian Henry Butcher bertarikh 31/10/2017 sebanyak RM1,100,000.00 bagi hartanah pertama tersebut;

(9) bahawa taksiran duti setem tersebut yang dibuat oleh Defendan diubah dan bahawa Mahkamah Mulia ini mengarahkan supaya duti setem yang dikenakan ke atas Perjanjian Jual Beli tersebut dan/atau Borang Pindahmilik kedua tersebut ditaksir berjumlah kepada RM196,050.00 berdasarkan Laporan Penilaian Henry Butcher bertarikh 31/10/2017 sebanyak RM6,735,000.00 bagi hartanah kedua tersebut; dan

(10) bahawa Defendan diarahkan untuk membayar balik ('refund') kepada Plaintif duti setem yang terlebih bayar oleh Plaintif bagi hartanah pertama tersebut dan hartanah kedua tersebut tujuh (7) hari dari tarikh perintah mahkamah berdasarkan taksiran yang terkhilaf tersebut;

(11) kos permohonan dan kos sampingan dengan permohonan ini dibayar oleh Defendan kepada Plaintif; dan

(12) perintah atas relief selanjutnya sebagaimana difikirkan suaimanfaat dan adil oleh Mahkamah mulia ini.

[4] Having considered the respective parties' written submissions, the oral arguments and the relevant records of appeal, we had allowed the appeal. These are our reasons in respect of the said decision.

SALIENT FACTS

[5] By a sale and purchase agreement dated 16 June 2017, the appellant agreed to purchase HSM 1501, PTD 116764 and HSM 1614, PTD 136949

from Luxury Setup Sdn Bhd for the consideration of RM1m and RM5m respectively. For convenience, we shall adopt the reference of the learned JC regarding the two properties of HSM 1501, PTD 116764 and HSM 1614, PTD 136949 as 'the first subject lot' and 'the second subject lot' respectively.

[6] The appellant then submitted to the deputy collector of stamp duty for adjudication under s 36, Act 378, the land transfer forms in Forms 14A dated 13 September 2017 under the National Land Code at the consideration sums of RM1,000,000 for the first subject lot and RM5,000,000 for the second subject lot.

[7] The Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') assessed the market value of the two properties. Following the said valuations, the deputy collector of stamp duty assessed the duty payable under item 32(a) of the First Schedule, Act 328 on Form 14A of:

(a) the first subject lot as RM70,920 based on the market value of RM2,564,000; and

(b) the second subject lot as RM432,000 based on the market value of RM14,600,000.

[8] The appellant objected to the assessment and contended that:

(a) the assessment in respect of the first subject lot should be RM27,000 based on the market value of RM1m; and

(b) the assessment in respect of the second subject lot should be RM196,050 based on the market value of RM6,735,000.

[9] The appellant's objections were rejected by the deputy collector of stamp duty who maintained that the stamp duty payable on Form 14A in respect of the first subject lot and the second subject lot should be RM70,920 and RM432,000 respectively.

[10] The appellant having paid on 13 December 2017 the stamp duties of RM70,920 and RM432,000 as required under s 39(1), Act 328 under protest, filed the appeal in the High Court at Johor Bahru via Originating Summons dated 24 December 2017 against the decision of the deputy collector of stamp duty by way of a case stated pursuant to s 39 of the Act.

[11] On 19 February 2018, JPPH produced a valuation report valuing both properties at a reduced value of RM2,089,000 for the first subject lot and RM13,970,000 for the second subject lot.

[12] On 4 February 2018, the deputy collector of stamp duty issued to the appellant an amended assessment for stamp duty payable on Form 14A under item 32(a), Act 328 as follows:

(a) the first subject lot — RM56,670 based on the market value of RM2,089,000 and reducing the stamp duty payable by RM14,250; and

(b) the second subject lot — RM413,100 based on the market value of RM13,970,000 and reducing the stamp duty payable by RM18,900.

HIGH COURT'S DECISION

[13] The learned JC held that the crux of the appeal revolved around which assessment was preferred, namely:

> (a) the respondent's assessment of stamp duty amounting to RM56,670 and RM413,100 based on the market value by JPPH of RM2,089,000 for the first subject lot and of RM13,970,000 for the second subject lot respectively; or (b) the appellant's assessment of stamp duty on the market value by Messrs Henry Butcher (private valuer who prepared the appellant's valuation report) of RM1.1m for the first subject lot and of RM6,735,000 for the second subject lot.

[14] The learned JC at para 22 of her grounds of judgment stated 'It is trite law that the report of a private valuer is resorted to only if it is proved that the valuation officer of JPPH had wrongly exercised his discretion, or had contravened the law by acting in excess of his powers provided by the Stamp Act'. The Federal Court case of *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association* [2011] 2 MLJ 442 at p 454; [2012] 9 CLJ 977 at 990, para [17] was cited.

[15] The learned JC held that the appellant failed: (i) to show that JPPH had wrongly exercised its discretion or had contravened the law by acting in excess of the powers of given by Act 378; and (ii) to establish the market value of RM1.1m for the first subject lot and of RM6,735,000 for the second subject lot.

[16] The learned JC was of the view that upon consideration of the oral and documentary evidence, the comparable lots (*lot-lot perbandingan*) used by JPPH were more suitable and reliable. Her Ladyship found DW1 had explained to the court's satisfaction and justified how JPPH arrived at the market value of the two properties but that PW1 did not successfully rebut the approach and method employed by JPPH and failed to convince the court that his method of computation was correct.

[17] Having preferred the respondent's valuation report to that of the appellant's valuation report, the learned JC found that the stamp duty assessed by the respondent was correct and consequently dismissed the appellant's appeal.

OUR DECISION

[18] Based on the memorandum of appeal, there are essentially two issues on appeal ie:

(a) whether the learned JC erred when she failed to order the respondent to refund the excess payment made by the appellant on the stamp duty on transfer for the first subject lot and the second subject lot in the sum of RM14,250 and RM18,900 respectively; and

(b) whether the learned JC failed to apply the correct principle of law as to what constitutes the comparable method of valuation, hence she arrived at the wrong conclusion when assessing the market value of the two properties.

Whether there was failure to apply the correct principle of law as to what constitutes the comparable method of valuation

[19] This constituted the substantive ground of appeal of the appellant in that the learned JC erred when she applied the wrong principle of law in applying the comparable method of valuation in respect of the two properties.

[20] Before delving into the merits of this ground of appeal, it will be worth stating the following principles of law which are undisputed and were noted by the learned JC in her grounds of judgment.

[21] The relevant date for the determination of the market value of the first subject lot and the second subject lot shall be the date of the sale and purchase agreement dated 16 June 2017. This is provided in s 12A, Act 328 which reads:

> 12A Assessment of the value of property under transfer or settlement
>
> Where an instrument is chargeable with duty under item 32(a) of the First Schedule, *the date for determining the market value* of any property being transferred, settled or gifted shall be-
>
> (a) ...
>
> (b) in the case of transfer implementing a sale under a duly stamped agreement of sale and purchase, *the date of execution of that agreement;* (Emphasis added.)

[22] Item 32(a), Act 328 provides that the stamp duty levied is ad valorem

based on 'the money value of the consideration or the *market value* of the property, whichever is the greater'. A

[23] The term 'market value' is not defined in Act 328 but it has been judicially defined in many cases, among them is the high authority of *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288 where Suffian LP (as he then was) (delivering the judgment of the Federal Court) at p 291, opined as follows: B

> It is common ground that in determining the market value, nowhere defined in the Ordinance, the courts should be guided by the principles that apply under the Land Acquisition Act -namely, *market value is the price which a willing seller not obliged to sell, might reasonably expect from a willing purchaser with whom he was bargaining for sale and purchase of the land* (*Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 1 MLJ 69; [1953] 1 LNS 59) *and this amount can best be determined by looking at recent sales of comparable lands in the vicinity.* (Emphasis added) C D

[24] Further, in *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35, Syed Agil Barakbah FJ (as he then was) (delivering the judgment of the Federal Court) at p 37 considered the following are main principles: E

> *First, market value* means the compensation that must be determined by reference to *the price which a willing vendor might reasonably expect to obtain from a willing purchaser … Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account.* The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. the possibility of it being used for building or other developments. *Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road* to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. *Fifthly, estimates of value by experts* are undoubtedly some evidences but too much weight should not be given unless it is supported by, or coincides with, other evidence. (*Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd*, *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer*, *Vizagapatam, and Nanyang Manufacturing Co v Collector of Land Revenue Johore*). (Emphasis added.) F G H

[25] To reiterate, the learned JC for reasons contained in paras 20–62 of her grounds of judgment in considering whether JPPH had exercised due care and diligence in arriving at the market value of the first subject lot and the second subject lot or whether the method of valuation of Messrs Henry Butcher was suitable and reliable in respect of the same matter, made her findings as per I

paras 16–17 above which were in favour of JPPH's valuation as opposed to that of Messrs. Henry Butcher. We find this approach of the learned JC is in accord with the principle established in *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association*.

[26] The learned JC in *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association* had rejected the JPPH Valuation Officer's valuation and resorted to the valuation report of the respondent's private valuer. The Federal Court at p 454 (MLJ); 990 (CLJ), para [17] and pp 454–455 (MLJ); p 991 (CLJ), para [18] was of the view that the learned JC's rejection of JPPH Valuation Officer's valuation was not proper and could only reject the same and resort to the respondent's private valuer's valuation report if it can be shown that 'the valuation officer had wrongly exercise(sic) his discretion, or had contravened the law by acting in excess of his powers provided by the Act [Stamp Act]' and when the learned JC provided ample justification as to her preference of the private valuer's valuation report rather than that of the JPPH Valuation Officer.

First subject lot

[27] It was acknowledged by counsel for the appellant that there is no dispute that JPPH applied the comparable method of valuation to arrive at the market value of the first subject lot and the second subject lot. This can be seen from the JPPH valuation report in respect of the first subject lot at 'Lampiran C, Rekod Rayuan Bahagian A' pp 143–148 which contains the particulars of the comparables relied on by the respondent. It is not disputed that the JPPH valuation report was prepared by SD1, Eniza bt Zainal Abidin, the government valuer from JPPH, together with one Encik Rafee bin Jaafar (District Valuer) after they had conducted a site visit to the first and second subject lots.

[28] We observed that the respondent's submission on the valuation prepared by JPPH pertaining to the first and second subject lots is primarily a mirror of what the learned JC stated in her grounds of judgment save for some relevant additions which we would refer to accordingly. The learned JC in considering whether JPPH had exercised due care and diligence in arriving at the market value of the first subject lot had relied on the evidence of SD1, Eniza bt Zainal Abidin:

(a) who affirmed the comparison approach and 'compared the latest sale and purchase transactions of four (4) comparable lots ('Lot Perbandingan 1.1–1.4'), and one additional lot ('Lot Perbandingan 1.5') which were transacted and valued in 2011, all with similar characteristics and features and location as the first subject lot'; and

(b) who described that the first subject lot had the following characteristics and features: vacant, irregular in shape, accessible from Lebuhraya Senai, surrounded by a mixed residential scheme area; freehold, with land usage as building and zoned as 'residential' area.

[29] We further observed there can be no doubt that JPPH applied the comparable method of valuation as reflected in the JPPH valuation report in respect of the first subject lot at 'Rekod Rayuan Bahagian A Lampiran C' pp 144–148 which contained the particulars of the comparables relied on by JPPH. The comparables are listed as follows:

(a) Lot Perbandingan 1.1: PTD 1617191 HSD 473201;

(b) Lot Perbandingan 1.2: 52350 GRN 60103;

(c) Lot Perbandingan 1.3: PTD 201395 HSD 558956;

(d) Lot Perbandingan 1.4: PTD 210920 HSD 512590; and

(e) Lot Perbandingan 1.5: PTD 156609 HSD 471200.

[30] The analysis of the comparables by JPPH vis a vis the first subject lot is found at 'Rekod Rayuan Bahagian A Lampiran D' p 150. The learned JC stated in her grounds of judgment the following:

> The necessary upward and downward adjustments to the value per square metre of each comparable were made to the differing factors before arriving at the fair value per square metre, in determining the market value of the first subject lot.

[31] We find that in arriving at 'the fair value per square metre' in determining the market value of the first subject lot, the learned JC did not specify 'the necessary upward and downward adjustments' made to 'the differing factors.' According to the respondent's submission, the comparable factors are 'Masa, Lokasi/Jalan Masuk, Bentuk, Saiz (METER PERSEGI), Jenis Tanah, Rupabumi, Pegangan Hakmilik, Kategori Tanah, Syarat and Perancangan'. We accept that these are the comparable factors as they are listed in 'Lampiran D' p 150, first column of table titled 'Pelarasan Tanah'.

[32] Following the adjustment, in relation to the first subject lot, at para 28 of the grounds of judgment, the learned JC held Lot Perbandingan 1.1 as the 'best comparable lot due to its similar features and location which led JPPH to recommend the price of RM220 per sqmt as fair and reasonable. During cross-examination, DW1 had explained in detail, to the satisfaction of the Court, the reasons for using Lot Perbandingan 1.1'.

[33] Having drawn the attention of the court to the common plan depicting all the comparables with the first subject lot at 'Rekod Rayuan Bahagian C, Jld

2B' p 529, learned counsel for the appellant admitted 'Lot Perbandingan 1.1' as the comparable lot that has the most similarities in that it is nearest to the first subject lot; land use is for low cost flat, just like the first subject lot, which is for low medium and low cost flat; and the date of transaction was 8 November 2016 but the transaction of the first subject lot was 16 June 2017, only about seven months apart. It is significant that counsel for the appellant had candidly conceded that the respondent's valuer, Mr Teoh Leong Seng (PW1) to borrow his words, 'messed up and used the wrong comparable but we concede that the most suitable comparable is comparable 1 but we are sticking to RM1.1m as that is our appeal' (we shall revert to the appellant's contention of the market price of the first subject lot being at RM1.1m later). The concession made by the appellant, in our view, dispensed with the need to deal with arguments on the suitability of the remaining comparables, Lot Perbandingan 1.2, 1.3, 1.4 and 1.5.

[34] We now turn to the nub of the appellant's substantive argument. Counsel for the appellant drew our attention to 'Rekod Rayuan Bahagian A Lampiran C' p 144, at the fourth column bearing the notation 'Balasan (B)' and *'Nilaian (N)'* and the analysis of the five comparables, Lot Perbandingan 1.1 to 1.5 at Lampiran D pp 149-150, in particular, p 150 third column which reads:

DUTI SETEM	
NILAIAN	
RM150,000.00	
PT 167191 (LOT 120598)	
06/11/2016	
RM10.92	(B)
RM220.00	(N)

[35] Counsel highlighted that SD1 during cross-examination admitted she was unable to show to the court 'pembandingan yang digunakan oleh JPPH semasa menentukan angka [RM220 meter persegi]' and she also agreed when it was put to her that 'bahawa memandangkan apa yang kamu telah katakan, kamu tidak terlibat di dalam keputusan menentukan angka RM220 meter persegi ini, betul?' ('Rekod Rayuan Bahagian B' p 223). Counsel for the appellant argued that based on the evidence given by SD1, it is clear that the market price RM220 per sqmt was decided by JPPH themselves when they made the analysis in 2018 being the date of the valuation report dated 19 February 2018 and not on 8 November 2016, the date of the transaction of Lot Perbandingan 1.1. Counsel further argued that whilst SD1 testified it was based on the comparable method, there was no comparable to justify the figure of RM220 per sqmt as it was a figure plucked from the sky which is evident from the footnote:

ANALISA COM DI ATAS:-
1.CADANG DINILAI @ RM220) SMP
(ANALISA BALASAN COM1)

[36] Counsel for the appellant also argued that JPPH used Lot Perbandingan 1.1 as the basis to value the first subject lot but they did not use the price paid for Lot Perbandingan 1.1, ie the consideration of RM10.92 (B) being the price on which the stamp duty was paid but instead used RM220 per sqmt which was the figure which JPPH themselves fixed as categorically admitted by SD1 during cross-examination ('Rekod Rayuan Bahagian B' pp 223–224).

[37] Whilst we agreed with the submission of the appellant that it is the sales evidence of the actual price that must be used as the comparable, it is our considered view that the prices paid for such sales are qualified by the common rider 'subject to making allowances for all the circumstances'. This is borne by the following oft quoted authorities of:

(a) *Collector of Stamp Duties v Ng Fah In & Ors* where the Federal Court held that:

> ... this amount [market value] can best be determined by looking at recent sales of comparable lands in the vicinity. The learned judge was aware of this principle. He was also aware of what the attitude of the court should be when considering comparable sales, for he quoted this passage from *LAO v Venkateswami* (1967) 1 An WR 79 cited by Aggarawala, Vol 1, 4th Ed, p 339:
>
> The underlying principle of fixing the market value with reference to comparable sales *is to reduce to the minimum the element of speculation.* In a comparable sale the features are:
>
> (1) *It must be* within *a reasonable time of the date of notification, [in our case, the date of the transfer]*;
>
> (2) It should be a *bona fide transaction*;
>
> (3) It should be a sale of land acquired or of the land *adjacent to* the land acquired; and
>
> (4) It should possess similar advantages.
>
> *It is only when all these factors are present that it could merit consideration as a comparable sale*';

(b) *Ng Tiou Hong v Collector of Land Revenue, Gombak* where the Federal Court opined that:

> Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. The safest guide is evidence of sales of similar lands of similar

A quality or position in the locality at or prior to the time of acquisition. *The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.*

(c) *Setia Usaha Tetap Kementerian Pelajaran v Collector of Land Revenue, Butterworth* [1972] 2 MLJ 155 at p 157 where Chang Min Tat J (as he then was) wherein His Lordship after making reference to the three recognised methods of valuation under a parallel legislation, namely, the land acquisition legislation in the judgment of Buhagiar J in *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 1 MLJ 69 opined that:

> Of these three methods, the learned Judge considered that the safest guide to determine the fair market value *was evidence of sales of the same land or similar land in the neighbourhood after making due allowance for all the circumstances.*

(d) *Malakoff Bhd v Pemungut Hasil Tanah Seberang Perai Utara, Butterworth* [2005] 2 MLJ 229 at p 232; [2005] 1 CLJ 365 at p 368, where the Federal Court echoed the view expressed in *Ng Tiou Hong v Collector of Land Revenue, Gombak* stating:

> In determining market value, our courts as a matter of course have adopted the comparable method of valuation of land where there is ample evidence of sales or awards involving similar lands. What this method entails was succinctly explained by the Federal Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak*'. The case of *Malakoff Bhd v Pemungut Hasil Tanah Seberang Perai Utara, Butterworth* was cited by the respondent.

[38] In light of the golden thread ie 'subject to making allowances for all the circumstances' which runs throughout the authorities quoted above, evidence of sales involving similar lands is not the sole criterion. In fact, the consideration of the price paid in respect of the comparable used is acknowledged by the respondent in their submission but they added that 'that is not the end of it.'

[39] In this regard, we agreed with the respondent's submission that the consideration of the price paid in respect of the comparable used is not the sole determinant to determine the market value of the First and second subject lots. Besides the prices of sales of similar lands in the locality, in order to determine at the market value, there are other factors which the respondent has to consider as enunciated by the Federal Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak* which we have reproduced at para 24 above.

[40] This brings us to the question of whether JPPH can use JPPH's own opinion of the value of the comparables instead of the actual price paid. In other words, this turns on the issue on the use of (N) and not (B) in the JPPH valuation report. We find that the counsel for the appellant had conducted a

thorough cross-examination of SD1 ('Rekod Rayuan Bahagian B' pp 221–230). In rebuttal, learned senior revenue counsel for the respondent attempted to rely on the clarification from SD1 during re-examination at 'Rekod Rayuan Bahagian B' pp 250–252 and submitted that SD1 'had carefully pointed out how (N) came about.' Senior revenue counsel also submitted that SD1 had explained: (a) the basis of (N) where JPPH had carried out the practice in which to use comparables to determine the reasonable market value for a particular valuation; and (b) that the details of comparables are not stated in the adjustment made because it is not related to the First and second subject lots; it concerns only the comparable lots.

[41] Regretfully we disagreed with the said submission of senior revenue counsel. Having perused the answers proffered by SD1 during re-examination, we find that SD1 has not explained how the value 'N' of RM220 per sqmt can be used to determine the market value of the first subject lot. Firstly, in our considered view the answers of SD1 given in re-examination by senior revenue counsel are of no evidential value for the following reasons:

(a) when asked by 'apakah asas-asas nilaian yang digunakan untuk mendapatkan nilaian jabatan? Dan adakah comparable digunakan untuk mendapatkan nilaian tersebut ataupun tidak?', SD1 answered:

> jabatan kami masih menggunakan practise ... ia itu menggunakan perbandingan-perbandingan balasan bagi menentukan harga pasaran yang munasabah dan bersesuaian untuk penilaian tersebut dilakukan.

Thereafter we noticed SDI's answers became answers given to leading questions (as emboldened) as can be seen below:

Muazmir: Alright. *Tetapi detail-detail perbandingan tersebut tidak terkandung di dalam pelarasan.*

SD1: Betul.

Muazmir: Kenapa?

SD1: Tidak perlu kot.

Muazmir: *Tidak perlu. Because ia tidak berkait dengan lot subjek?*

SD1: Betul.

Muazmir: *Ia hanya lot perbandingan?*

SD1: Ya. (Emphasis added.)

(b) the fact that SD1 admitted that the details of the comparables are not stated in the adjustment made because it is not related to the first and second subject lots and it concerns only the comparable lots is not acceptable because as per the analysis table, all details of comparables

used are stated therein. SDI's answer in fact fortified that there was no comparable to justify the figure of RM220 per sqmt as admitted by SD1 in cross-examination; and

(c) what JPPH did in using the value 'N' of RM220 per sqmt to determine the market value of the first subject lot, as submitted by the counsel for the appellant is tantamount to valuation upon a valuation; a revaluation of the comparable which is erroneous.

[42] With respect to the learned JC, nowhere in her grounds of judgment did she consider the appellant's argument of the reason why the value 'N' of RM220 per sqmt ought not be used to determine the market value of the first subject lot. The learned JC merely stated in para 28 of her grounds of judgment that 'During cross-examination, DW1 had explained in detail, to the satisfaction of the Court, the reasons for using Lot Perbandingan 1.1' and accepted JPPH's recommendation of the price of RM220 per sqmt as fair and reasonable market value for the first subject lot.

[43] Therefore in our judgment, despite referring to *Ng Tiou Hong v Collector of Land Revenue, Gombak*, and agreeing that JPPH had used the comparable method of valuation, the learned JC erred in holding that JPPH had used due care and diligence in arriving at the market value of the first subject lot when Her Ladyship failed to apply the principle established in the aforesaid Federal Court authority of 'the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions' which is binding on her by the doctrine of stare decisis.

[44] From the analysis of the five comparables, Lot Perbandingan 1.1 to 1.5 at Lampiran D pp 149–150, it is obvious that in so far as Lot Perbandingan 1.1 is concerned, there was no percentage of adjustment made to the value per sqmt vis a vis the comparable factors referred to in para 31 above. This means that the price paid for Lot Perbandingan 1.1 is the actual price paid after factoring in the consideration of 'subject to making allowances for all the circumstances'. Therefore, using the price paid for Lot Perbandingan 1.1, which is RM10.92 per sqmt, the market value of the first subject lot measuring 9.474 sqmt is RM103,456.08 only (9.474 sqmt x RM10.92).

[45] Notwithstanding the above, to reiterate, counsel for the appellant conceded that the most suitable comparable is Lot Perbandingan 1.1 but the appellant were sticking to RM1.1m as that was their appeal. When pressed by the court as to why they were sticking to RM1.1m as the market price of the first subject lot, counsel for the appellant replied that purchase price of the first subject lot is RM1m and for stamp duty assessment, market price is either higher or the consideration, it could not go below the purchase price.

[46] In the circumstances, in respect of the first subject lot, since it is our finding that the learned JC was plainly wrong in her findings and the application of the law, in the exercise of our appellate intervention, we order that the stamp duty be assessed based on the market value of RM1.1m (see*Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58; [2020] 1 LNS 494 (FC) at para 47; and *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 (CA) at paras 5–19).

Second subject lot

[47] With respect to the second subject lot, there is no dispute that JPPH applied the comparable method of valuation as reflected in the JPPH valuation report at 'Rekod Rayuan Bahagian A Lampiran C' pp 174–178 which contained the particulars of the comparables relied on by JPPH. The comparables are listed as follows:

(a) Lot Perbandingan 2.1: 137699 GRN 449268;

(b) Lot Perbandingan 2.2: 45309 PN 56050;

(c) Lot Perbandingan 2.3: 72991 GRN 65305;

(d) Lot Perbandingan 2.4: PTD 222154 HSD 548197; and

(e) Lot Perbandingan 2.5: PTD 56074 HSD 227507.

[48] The analysis of the comparables by JPPH vis a vis the second subject lot is found at 'Rekod Rayuan Bahagian A Lampiran D' p 180. The learned JC stated in her grounds of judgment the following:

> [48] The necessary upward and downward adjustments to the value per sqmt of each comparable were made to the differing factors before arriving at the fair value per sqmt of the second subject lot.
>
> [49] From the adjustment made by comparing the second subject lot to the Lot Perbandingan 2.1-2.5, the value that was obtained was within the range of MYR670-MYR755 per sqmt. Ultimately, Lot Perbandingan 2.4 was taken as the best comparative lot due to its similar features and location, which led JPPH to recommend the price to MYR670 per sqmt as fair and reasonable. During cross-examination, DW1 had explained in detail, to the satisfaction of the Court, the reasons for using Lot Perbandingan 2.4.

[49] We find that in arriving at 'the fair value per sqmt' in determining the market value of the second subject lot, the learned JC did not specify 'the differing factors' to which 'the necessary upward and downward adjustments' were made. According to the respondent's submission, the comparable factors are 'Masa, Lokasi/Jalan Masuk, Bentuk, Saiz (METER PERSEGI), Jenis Tanah, Rupabumi, Pegangan Hakmilik, Kategori Tanah, Syarat and

Perancangan'. We accept that these are the comparable factors as they are listed in 'Lampiran D' p 180, first column of table titled 'Pelarasan Tanah.'

[50] Following the adjustment, in relation to the second subject lot, at para 49 of the grounds of judgment, the learned JC held Lot Perbandingan 2.4 as the 'best comparable lot due to its similar features and location which led JPPH to recommend the price of RM670 per sqmt as fair and reasonable. During cross-examination, DW1 had explained in detail, to the satisfaction of the Court, the reasons for using Lot Perbandingan 2.4'.

[51] The learned JC opined that '[50] The market value of MYR 13,970,000 was arrived at by multiplying the value per sqmt which is RM670 to the land are size of 20,875 sqmt and rounded up to the closest thousand'.

[52] Regarding the second subject lot, counsel for the appellant during oral submission conceded that the JPPH valuation report is more accurate than the respondent's valuation report except for the following:

(a) the wrong comparable was used: the appellant contended that Lot Perbandingan 2.2 is the more accurate comparative lot and not Lot Perbandingan 2.4 which was used by JPPH as the best comparative lot to determine the market value of the second subject lot; and

(b) that JPPH had used the wrong figure of (N) instead of (B) which is not in accordance with the legal principle based on the sales evidence of the actual price that must be used as the comparable following the authorities which we have alluded to in para 37 above. According to the counsel for the appellant, the argument in respect of the second error made by learned JC is the same as that submitted regarding the first subject lot.

[53] In respect of the first error, ie the wrong comparable was used, counsel for the appellant argued that Lot Perbandingan 2.4 used by JPPH was the wrong comparable for the following reasons:

(a) the comparable lot is the furthest comparable from the second subject lot;

(b) the land is designated for holiday homes/strata housing which is different from the second subject lot which is for apartments; and

(c) the comparable lot was transacted on 20/9/2013 that is more than three years and nine months prior to the appellant's date of transaction.

Counsel submitted that the most suitable comparable would be Lot Perbandingan 2.2, bearing in mind the following features:

Area: 28,140 sqm

Land Use/Tenure: Apartment/Leasehold 99 yrs

Date: 21/12/2016

Transaction (B):

We find there is merit in the submission of counsel for the appellant as it is visually evident from the Common Plan For Comparables in respect of the second subject lot, 'Rekod Rayuan Bahagian C, Jld 2B' p 531, that in terms of the land use and the date of transaction, prices of sales of similar lands in the neighbourhood or locality, that the more appropriate comparable lot would be Lot Perbandingan 2.2 (see *Ng Tiou Hong v Collector of Land Revenue, Gombak*).

[54] In respect of the second error that JPPH had used the wrong figure of (N) instead of (B), counsel for the appellant submitted that in respect of Lot Perbandingan 2.2, where (B) was RM14m and (N) was assessed by JPPH as RM31m, which on analysis, the market value was determined at RM 497.51 per sqmt and RM1,100 per sqmt respectively. Counsel for the appellant highlighted that SD1 was cross-examined as follows:

Ng: Sekiranya kamu gunakan 497 tolak 20 peratus atau apa dinyantakan untuk adjustment. Apakah nilai tanah subjek?

D1: 8,301,252.86.

('Rekod Rayuan Bahagian B' p 239)

Based on the evidence of SD1, vounsel for the appellant submitted that the market value of the second subject lot ought to be RM8,301,252.86 and not RM6,735,000 (para 10 p 19 of the originating summons at 'Rekod Rayuan Bahagian A', which he conceded was an error.

[55] In respect of the second error, that JPPH had used the wrong figure of (N) instead of (B), we find that the learned JC had erred for the same reasons which we have given in respect of the first subject lot and we agreed with the submission of counsel for the appellant that the market value of the second subject lot ought to be RM 8,301,252.86.

[56] In the circumstances, in respect of the second subject lot, on account of the first and second errors, since we find that the learned JC was plainly wrong in her findings and the application of the law, in the exercise of our appellate intervention based on the authorities cited in para 46 above, we order that the stamp duty be assessed based on the market value of RM8,301,252.86.

Refund of excess payment

[57] Under this ground of appeal, counsel for the appellant argued the learned JC had erred when Her Ladyship dismissed the appeal and did not make any order of refund. Counsel submitted at the very minimum, there

should be a rectification order in view of the clear provision of s 39, Act 328 and that there is no dispute as to excess payment. The appellant paid RM70,920 and RM432,000 in respect of the first and second subject lots respectively. Based on the amended assessment by the collector of stamp duty, the stamp duty payable was RM56,670 and RM413,100 in respect of the first and second subject lots respectively. Therefore, the appellant paid excess stamp duty of RM14,250 and RM18,900 in respect of the first and second subject lots respectively. Counsel for the appellant argued that the learned JC should have invoked s 39(4), Act 328 which provides that it is mandatory for the court to order the refund because of the excess payment.

[58] Without labouring further, senior revenue counsel submitted that they are not averse to this ground of appeal. In our judgment, it is mandatory for any excess payment of stamp duty which has been paid shall be refunded as has been explicitly provided under s 39(4), Act 328. Assuming the learned JC was correct in her decision, then the excess sum totalling RM33,150 (RM14,250 and RM18,900 in respect of the first and second subject lots respectively) ought to be refunded to the appellant.

[59] However, given our findings that there had been an erroneous assessment of the stamp duty payable by the appellant based on the market value of the first and second subject lots, we therefore order that the refund of excess stamp duty shall be made by the respondent after the necessary adjustments are being made to the computation based on our assessment of the market value of the two properties.

CONCLUSION

[60] For the reasons adumbrated above, we found merit in the appeal which warranted appellate intervention. In the premises we unanimously allowed the appeal with costs subject to allocatur and we set aside the order of the High Court dated 31 October 2019. We further ordered the following:

(a) for the first subject lot, stamp duty to be assessed based on the market value of RM1.1m;

(b) for the second subject lot, stamp duty to be assessed on the market value of RM8,301,252.86; and

(c) excess duty shall be refunded to the appellant.

Appeal allowed with costs.

Reported by Ahmad Ismail Illman Mohd Razali